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No. 500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

FRUIT INDUSTRIES, INC.,
Petitioner,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, DECEASED; J. B. PETTY, SR., As Administrator of the Estate of JOE FORREST PETTY, DECEASED; and, ERNEST BAIRD and JOY JEFFREY, Individually and as partners, d b a BATESVILLE FUR COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A1)*, has been reported in 268 F.2d

*The Appendix to this petition is cited herein as "App." The printed record in the Court of Appeals is cited as "R". Pursuant to

391. There was no opinion by the District Court, but the verdict and final judgment on jury verdict in Case No. 3200*1, appears at (R. 33-34), and in Case No. 3201 at (R. 422-423), and in Case No. 3202 at (R. 462-463) respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 29, 1959, in the United States Court of Appeals for the Fifth Circuit (App. A1). An order denying rehearing was filed on September 11, 1959 (App. A21). On September 28, 1959, a stay of mandate for thirty days was filed provisioned upon the filing of a certificate of the Clerk of this Court of the filing of a petition for a writ of certiorari within the thirty-day period, and providing that

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Rule 21(4), nine copies of the printed record for the use of the court below are being filed with this petition. Such record constitutes the entire record of the proceedings and evidence in the District Court, and except for the omission of unimportant orders and stipulations was designated to constitute the record on appeal and was so printed. Certain exhibits were not printed in the designated record and were submitted to the Court of Appeals by stipulation. In the event of a grant of this petition, petitioners may wish to file such original exhibits in this Court.

*1. Three cases were brought against the petitioner, which are now the subject of this petition. In the United States District Court for the Southern District of Florida the cases were named and numbered as follows: Stella Petty, as Administratrix of the Estate of Julius E. Petty, Deceased, Plaintiff, vs. Fruit Industries, Inc., Defendant, Case No. 3200; J. B. Petty, Sr., as Administrator of the Estate of Joe Forrest Petty, Deceased, Plaintiff, vs. Fruit Industries, Inc., Defendant, Case No. 3201; and Ernest Baird and Joy Jeffrey, Individually and as partners, d/b/a Batesville Fur Company, Plaintiffs, vs. Fruit Industries, Inc., Defendant, Case No. 3202. The cases were by consent and order of Court consolidated for trial in the District Court (R. 25), and in the Court of Appeals (R. 2). Hereinafter for the convenience of the Court, the cases will be referred to by their District Court designated numbers.

if no such certificate is filed or upon the filing of an order of the Supreme Court denying the writ, if filed, the mandate should then issue. Said order was signed by J. C. Hutcheson, Jr., United States Circuit Judge (App. A27).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court in this cause was invoked under 28 U.S.C. 1332(a) and 1332(a)(1).

QUESTIONS PRESENTED.

In an action for damages in a diversity of citizenship case resulting from an automobile accident in Iowa between residents of Arkansas and Florida[1], the District Court refused to direct a verdict for the Petitioner, although as a matter of Iowa law under which the case should have been tried (since Iowa was the situs of the accident), the Respondents had failed to prove that the Petitioner's negligence, if any, was the proximate cause of their damage and had failed to plead and prove freedom from contributory negligence.

The District Court further refused to instruct the jury at the Petitioner's request that the Respondent driver was guilty of contributory negligence as a matter of Iowa law and failed to instruct the jury that under the Iowa law the burden of proof was upon the Respondent in all three cases to plead and prove their own freedom from contributory negligence. The District Court did instruct the jury, contrary to the Iowa law, that the contributory negligence of the driver of the Respondent's car could not be imputed to the other two Respondents and, there-

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1. In all three cases there was diversity of citizenship and an amount involved sufficient to give the District Court jurisdiction under 28 U.S.C. 1332 (a) and 1332 (a)(1).

fore, the question of contributory negligence was only in issue in the case of the driver.

The questions presented are:

1. Whether the trial court erred in not applying the law of Iowa and in refusing to direct a verdict for the petitioner and further erred in refusing to grant judgment notwithstanding the verdict or in the alternative to order a new trial because of the respondent's failure to establish the proof necessary under the Iowa law, which was the situs of the case and was, therefore, the controlling law because:

(a) Under the Iowa law the respondents as a matter of law failed to prove by a preponderance of the evidence that the evidence, if any, of the negligence of the petitioner was the proximate cause of their damage.

(b) Because under the Iowa law the respondent's decedent in Case No. 3200 was guilty of contributory negligence as a matter of Iowa law which would preclude his recovery, and;

(c) Because the respondents in Cases Nos. 3201 and 3202 offered no evidence of any kind as to their own freedom from contributory negligence and, therefore, failed to make a *prima facie* case.

2. Whether the District Court failed to properly instruct the jury as to the Iowa law to be applied.

3. Whether the United States Court of Appeals for the Fifth Circuit in not reviewing the failure of the trial court to apply the Iowa law so far sanctioned a departure of the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, because it was apparent on the face of the record that a miscarriage of justice would occur.

4. Whether the decision of the United States Court of Appeals for the Fifth Circuit affirming the action of the District Court in failing to properly apply the Iowa law is not in conflict with the decision of the United States Court of Appeals for the Eighth Circuit on the same matter.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra*, p. A29.

STATEMENT.

These cases arose as the result of an automobile accident occurring in the State of Iowa on December 21, 1956, wherein an automobile driven by Julius E. Petty of Stuttgart, Arkansas, collided with a truck owned and being operated by the Standard Oil Co. (R. 47, 76). The latter was not made a party to any of these suits. Riding in the automobile as a passenger was Joe Forrest Petty. Furs being transported in the Petty automobile, which were damaged by fire in the accident, were owned by the plaintiff in Case No. 3202. Plaintiffs in Case No. 3200 and 3201, were the administratrix and administrator of the estates of the deceased occupants of the Petty car.

The defendant below is a Florida Corporation and the owner of a truck which was proceeding in the same direction and behind the Standard Oil truck, just prior to the accident in question, which occurred about 9:30 A.M., on Highway 218, nine miles north of Donnellson,

Iowa (R. 73, 74, 75). The weather was foggy and the highway wet and slippery (R. 78, 81). The accident occurred when the Petty automobile traveling north skidded or was driven into the west lane of the highway and there collided with the Standard Oil truck which was proceeding southerly in the west lane.

The complaint in each case alleged that the negligent operation of the petitioner's truck in pulling out to pass the Standard Oil truck was the proximate cause of the accident in that respondent's driver was thereby caused to believe that he was in impending peril of collision and to avoid such collision applied his brakes, causing the vehicle to swerve into the west lane (R. 3-9, 402-408, 435-441).

In none of the three cases did the respondents allege freedom from contributory negligence as is required in Iowa. Petitioner affirmatively alleged contributory negligence of the driver Petty as a matter of law. Respondent in Case No. 3200, to overcome the charge of contributory negligence on the part of the driver of the Petty automobile, introduced only the testimony of the Standard Oil driver (R. 73). The respondents in Cases Nos. 3201 and 3202 introduced no evidence of their freedom from contributory negligence as required by the Iowa law.

Trial of the cases in the District Court resulted in verdicts for the respondents*. On appeal to the United States Court of Appeals for the Fifth Circuit petitioner assigned as error of the District Court the failure of that

*The verdict in Case No. 3200 was $38,901.61, for the death of Julius E. Petty. The verdict in Case No. 3201 was $22,572.08, for the death of Joe Forrest Petty. The verdict in Case No. 3202 was $13,385.80, for damages to the pelts carried in the Petty automobile. At the time of their deaths, Julius E. Petty was 45 years old and Joe Forrest Petty was 13 years old.

court to direct a verdict in its favor at the end of the evidence; the failure of the trial court to find as a matter of law that the respondent's decedent in Case No. 3200 was guilty of contributory negligence as a matter of law; that the trial court erred in denying petitioner's motion to set aside the verdicts, or in the alternative to order a new trial; that the trial court erred in failing to find that the verdicts were excessive.

There was little dispute between the petitioner and the respondents concerning the circumstances that resulted in the accident. Respondents in each case relied heavily upon the testimony of the Standard Oil truck driver (R. 73). There was no direct evidence as to the causation of the conduct of the driver of the Petty car. The evidence most favorable to the respondents, if taken as true, could result only in the following:

Respondent's automobile was traveling north at least sixty miles an hour (R. 83). Petitioner's truck was traveling south behind the Standard Oil truck (R. 75). Visibility was about 500 feet because of heavy fog (R. 78). The highway was blacktop and slippery (R. 81). The Standard Oil driver first saw the Petty automobile approximately 500 feet ahead of him coming towards him (R. 89). The Standard Oil truck had traveled 75 to 100 feet between the time the driver first saw the Petty automobile ahead of him and the time he first saw the Petty automobile begin to skid (R. 92). At this point the Petty automobile was 200 to 300 feet closer to the Standard Oil truck (R. 78). After the Petty automobile started to skid it moved into the west lane, then back into the east lane, then back again into the west lane where it collided head-on with the Standard Oil truck (R. 76). The collision occurred entirely in the west lane (R. 98).

Prior to the accident the petitioner's driver had pulled out into the east lane as if to pass the Standard Oil truck, but prior to the time the Petty automobile started to skid petitioner's driver had started to drop back in behind the Standard Oil truck in his own lane and was only two or three feet in the east lane at the time the Petty automobile began to skid (R. 77-90. When the petitioner's truck pulled out to pass the Standard Oil truck it was 50 to 75 feet behind the Standard Oil truck (R. 77).

Respondents' theory of the case is readily apparent. They reasoned that when the Petty driver saw the petitioner's truck appear to begin to pass the Standard Oil truck which might cause a head-on collision with the petitioner's truck, the driver of the Petty car applied his brakes causing him to skid in front of the truck immediately preceding the petitioner's truck, which was the Standard Oil truck (R. 3-9, 402-408, 435-441). Respondents assigned as the actionable negligence of the petitioner the act of the petitioner's driver in pulling out to pass the Standard Oil truck. The respondents further theorize that although the Petty driver was in the wrong lane of traffic at the time of the actual collision which would be *prima facie* evidence of the negligence of the Petty driver, nevertheless, such negligence is excused legally by virtue of an emergency created by the petitioner. Such emergency the respondents assign to the petitioner on the basis of the facts elicited by the testimony of the Standard Oil truck driver (R. 73).

It becomes, therefore, apparent that, respondents' entire case with respect to the proximate cause of the accident resting on the petitioner is bottomed on circumstantial evidence as is the freedom from contributory negligence, which it was the burden of the respondent in Case No. 3200 to establish in order to recover. No evidence was presented

in Cases Nos. 3201 or 3202 concerning the freedom from contributory negligence of the respondents in those cases.

Petitioner's theory of the case is, that based upon the evidence most favorable to the respondents, they failed to establish a *prima facie* case against the petitioner in Case No. 3200 because the burden of proof rested upon the respondent in that case to establish freedom from contributory negligence and the presumptions attempted to be drawn by the respondent in that case as to his freedom from contributory negligence being bottomed entirely upon circumstantial evidence, did not sufficiently rebut the *prima facie* negligence of the respondent's driver in being on the wrong side of the road when the accident occurred. Moreover, since under Iowa law any negligence on the part of the respondent in that case would preclude recovery, that negligence was present as a matter of law because of the position of the automobile of the respondent at the time the accident occurred.

Petitioner further asserts that the respondents in all three cases failed to establish their *prima facie* case against the petitioner, since taking the evidence most favorable to the respondents as true, they failed to establish as a matter of law that the negligence, if any, of the petitioner was the proximate, moving cause of their damage.

During the trial an effort was made by the court and counsel to define the Iowa law as it would be controlling in the case. Counsel for the petitioner urged the proper Iowa rule in connection with contributory negligence, which is that the plaintiff has the burden of proving he is free from contributory negligence in tort actions (R. 330 and 364), and at least on one occasion the court stated the proper rule (R. 364). Notwithstanding that fact, the court ruled that contributory negligence could not be urged

against the plaintiffs in Cases Nos. 3201 and 3202 (R. 364-5) and so instructed the jury. The court further instructed the jury that the duty of the parties was governed by the law of Iowa (R. 376), but failed to give the proper rule to be applied by the jury and instructed the jury that contributory negligence was not an issue in Cases Nos. 3201 and 3202 (R. 382, 384-5, 387), contrary to Iowa law.

The respondents were required to establish that the negligence of the petitioner was the proximate cause of the accident as a matter of law under the Iowa rules, and that burden was not successfully carried by the respondent. At the time the instructions were given no further objection was made by petitioner's counsel to the instructions other than during the colloquy between the court and counsel as to the instruction that should be given.

REASONS FOR GRANTING THE WRIT.

1. Failure of Federal (Florida) Court to Apply the Law of the Situs (Iowa).

Petitioner herein submits that this case, both in the trial court and in the Court of Appeals, has so far failed to recognize the Iowa law under which the case should have been tried that substantial injustice will be done if the case is not reversed and remanded, and the only avenue presently open to the petitioner is through this Court. This case arose as a result of an accident in Iowa and the Iowa law should have been applied correctly by the courts below.

At the end of the respondents' evidence a proper motion to direct a verdict against the respondents was made by the petitioner's counsel. At such point in the proceeding re-

spondents had failed as a matter of law to establish by a preponderance of the evidence that the negligence, if any, of the petitioner was the proximate cause of respondents' damages. Moreover, respondents had wholly failed to plead or prove freedom from contributory negligence in Cases Nos. 3201 and 3202, or prove freedom from contributory negligence (in Case No. 3200). These were requirements of the Iowa law binding upon the Florida courts in this case. The failure of those courts to require the respondents to comply with the Iowa law resulted in an injustice to the petitioner; since had the Iowa rule been applied petitioner would have obviously been entitled to a directed verdict in all three cases.

Again at the end of all the evidence another motion for a directed verdict was made and overruled by the trial court. At that point in the proceedings there had been an ultimate failure on the part of the respondents to assume their burden under the Iowa law. Thereafter, in a colloquy between counsel and the court concerning instructions the court failed to follow the requests of the petitioner in giving the correct rule as to the Iowa law and proceeded to instruct the jury contrary to that law.

It is on this basis that we submit that the jurisdiction of this Court should be invoked in order to rectify an obvious miscarriage of justice to the parties and an obvious misinterpretation of the Iowa law by the United States Courts in the Fifth Circuit. The failure of those courts to comprehend the Iowa law and apply it as the case now stands will be contrary to the decisions in the United States Court of Appeals for the Eighth Circuit with respect to the true Iowa rule as it is applied to this case. *Chicago, R. I. & P. R. Co. v. Lorejoy*, 8th Circuit (1953), 206 F.2d 77.

Scott v. *C., R. I. & P. R. R. Co.*, 8th Circuit, 197 F.2d 259 (1952). In this case the court held:

> "Under Iowa law plaintiff in a tort action has the burden of proving his freedom from contributory negligence. Citing Kinney v. Larsen, 239 Iowa 494, 31 N.W.2d 635; Mast v. Illinois Central, 8th Circuit, 176 F.2d 157."

In the *Mast* case, 8th Circuit, 176 F.2d 157, the court said:

> "For conceding that negligence as a cause of the collision, the burden was still upon the appellant to prove Mast's freedom from contributory negligence and on this question the appellant offered no material evidence."

The court said in *Russell* v. *Turner*, 148 F.2d 562, 8th Circuit (1945):

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error (citing cases). This does not mean that an appellant in order to obtain a reversal of a judgment in a case such as this must demonstrate error to a mathematical certainty, but it does mean that this court will not overrule a decision of a trial judge upon a question of state law except for cogent and convincing reasons."

The court further said in the *Mast* case, *supra*.

> "All that this court reasonably can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by clear misconception or misapplication of the law."

The requirement that a plaintiff must prove freedom from contributory negligence is well settled in a long line of Iowa decisions, including the most recent case of *Plum*

v. *M. & St. L.*, 91 N.W.2d 380, 249 Iowa 1187 (1958), where a passenger was required to plead and prove freedom from contributory negligence and an instruction that if the driver was free from contributory negligence it may be assumed that the passenger was also free therefrom, was held to be error, and in the case of *Paulson* v. *Haker*, Iowa , 95 N.W.2d 47 (1959), where it is said:

> "The negligence of the driver of the McCalmant car, if such there was, would not be imputed to the plaintiff's decedent here, but she was required to exercise ordinary care for her own safety. The burden being upon plaintiff to establish her freedom from negligence contributing to the injuries suffered in the absence of any evidence whatever upon the question of what she did or did not do, must be held as a matter of Iowa law, their case has failed in this respect (Citing 65 C.J.S., Negligence, Pars. 150, 151 and 157, Pages 794, 795)."

It has further been held in Iowa that it is not necessary that contributory negligence be shown before a directed verdict will be given, but only that there is insufficient evidence to show freedom from contributory negligence. *Scherer* v. *Scandrett*, 235 Iowa 229, 16 N.W.2d 329 (1944).

With respect to the question of all three of the respondents' cases it was incumbent upon the respondents to prove by the greater weight or preponderance of the evidence that the negligence complained of was the proximate cause of the injury sustained. *Van Wie* v. *United States*, 77 F. Supp. 22 (D.C., S.D., Ia., 1948). In that case it was further held that under the Iowa law in negligence cases:

> "by proximate cause is meant the direct and natural cause, unbroken by any other cause, without which the mishap would not have happened."

Further that case holds in Iowa contributory negligence means such negligence as contributes in any way or any degree directly to the injuries complained of.

Furthermore, in Iowa the plaintiff must *plead* and *prove* freedom from contributory negligence, even though Rule 8C of the Federal Rules of Civil Procedure asserts contributory negligence to be an affirmative defense. *Erie* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 114 A.L.R. 1487; *Cities Service* v. *Dunlap*, 308 U.S. 208, 60 S. Ct. 201. And in Iowa it has been held that the failure to allege freedom from contributory negligence is grounds for dismissal for failure to state a cause of action. *Brown* v. *Ill. Cent. R. Co.*, 123 Iowa 239, 98 N.W. 625; *Cahill* v. *Ill. Central Railway*, 137 Iowa 577, 115 N.W. 216.

But it was held in *Wilson* v. *Corbin*, 41 N.W.2d 702 (1950), 214 Iowa 593, that even though the plaintiff fails to plead freedom from contributory negligence and the defendant does so plead it as a defense, the burden of proof remains upon the plaintiff.

The burden, therefore, rested upon the respondent in Case No. 3200 to prove by a preponderance of the evidence the freedom from contributory negligence of the driver, Petty. The facts disclose that the driver, Petty, at the time of the accident, was on the wrong side of the road. Under the doctrine of *Babendure* v. *Baker*, 218 Iowa 31, 253 N.W. 834 and *Lanman* v. *Dearmin*, 246 Iowa 697, 69 N.W.2d 49, where a plaintiff is on the wrong side of the road it is *prima facie* negligence. As such it becomes the duty of the plaintiff, in order to assume its burden of showing freedom from contributory negligence, to do so by showing a legal excuse for being on the wrong side of the road at the time of the accident. The only evidence in this case that there was a legal excuse for the driver,

Petty, being on the wrong side of the road at the time of the accident comes purely from inferences made chiefly in argument by respondent's counsel. The legal excuse is reasoned by inference to be that the petitioner's alleged negligence in attempting to pass the Standard Oil truck when 500 feet from the plaintiff travelling in the opposite direction was such as to create a sudden emergency for the plaintiff, excusing his appearance on the wrong side of the road. But this is based entirely upon fact inferences not supported by the evidence. In the language of *Nitka* v. *Van Camp*, 40 N.W.2d 570, 256 Wis. 119:

> "There is no testimony in the record from which any inference can be drawn that would result in a reasonable conclusion as to what caused the accident."

Here we are faced with two inferences. (1) The inference of *prima facie* negligence, which is an inference of law, and (2) the inference of fact drawn by the respondent in Case No. 3200. But inferences of fact should never infer certain desired conclusions for they do not rise to the dignity of inferences or presumptions of law. As said by Judge Graven in *Mast* v. *Ill. Cent.*, 79 F. Supp. 149 (N.D.Ia. 1948), affirmed 176 F.2d 157, 8th Circuit (1949):

> "Either inference must first be grounded on facts that will support the inference which is best regarded as a logical conclusion."

and further,

> "It is a general rule that presumptions do not create their own foundations."

Citing *Monaghan* v. *Equitable Life Insurance Co.*, (1918), 184 Iowa 352, 162 N.W. 892. There further quoting:

> "But that certain evidence will raise a presumption of negligence does not in the least tend to estab-

lish that there is such evidence and presumptions warranted by the evidence of certain facts is no evidence of such facts."

Obviously therefore, either the inference in law in this case was not rebutted by the inference in fact to an extent that it can be said as a matter of law that the respondent assumed its burden to establish proximate cause and freedom from contributory negligence or at the most the two inferences created an equipoise. In either event the burden was not carried under the Iowa law and the motion for directed verdict in Case No. 3200 should have been sustained.

It can be seen from the above that there was failure on the part of the respondents in these cases to assume their burden, which would not only have justified but required the court to direct a verdict in favor of the petitioner. The failure of the trial court to so rule, and the Court of Appeals to reverse has effectively produced a situation where not only does an injustice exist as against the petitioner, but also it produces an incorrect conception of the law in the judicial archives of the United States Courts in Florida and the Fifth Circuit. It is for this reason that the petitioner so strongly urges this Court to issue a writ of certiorari to the Fifth Circuit Court of Appeals to correct this error, as is within the jurisdiction of this Court under Rule 19 of the Rules of the Supreme Court of the United States.

2. Failure of Federal (Florida) Court to Instruct the Jury As to the Law of the Situs (Iowa).

So far we have assumed that the error of the courts below rested in the failure to understand and apply the Iowa law with respect to a direction against the respondents. This question is always preserved for review and it

has been said in *Coca Cola Bottling Company* v. *Hubbard*, (C.A. 8th, 1953) 203 F.2d 859:

> "But in determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court (appellate court) must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury."

To be sure the petitioner assigned as error of the trial court the failure to so direct regardless of the question as to whether or not counsel for petitioner properly objected to instructions given or refused by the trial court as not properly advising the jury of the Iowa law. While it is generally true under Rule 51 of the Federal Rules of Civil Procedure that where objections are not made to such instructions or where objections are not made to the failure of the court to give requested instructions, such question may not later be raised on appellate review, it has also been held that the appellate court may in its discretion consider grounds of error in spite of a failure to object below where it is apparent on the face of the record that a miscarriage of justice may occur. *Shimabukuro* v. *Nagayama*, (App. D.C. 1944) 140 F.2d 13. In the Shimabukuro case the appellate court for the District of Columbia said, in discussing the impact of Rule 51 of the Federal Rules of Civil Procedure:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. * * * There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved. * * *"

And the Fifth Circuit in *Doucell, Inc.*, v. *Jowers*, 166 F.2d 214 (1948), has held:

> "We are of the opinion that the error committed is of such gravity that the case must be reversed on this ground also unless the failure of the defendant's attorney to object to the charge forecloses consideration of the point by us. * * * The court's right in a proper case to consider on its own motion errors patent upon the face of the record where no objection was made, was considered by the United States Court of Appeals for the District of Columbia in Shimabukuro v. Nagayama, supra. We find ourselves in thorough accord with the decision in that case."

And in *Hormel* v. *Helvering*, (1941) 312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 1037, Mr. Justice Black, speaking for this court, said:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."

The petitioner here respectfully suggests that the trial court was in error in failing to give proper instructions as to the Iowa law and that such failure on the part of the trial court should have been corrected by the trial court, regardless of objections of counsel, since it is incumbent

upon the court to instruct the jury concerning the correct law. The failure of the trial court in this respect, we respectfully submit, should have been sufficient under all the circumstances to have required the Court of Appeals to return the case to the court below. Yet the opinion of the Court of Appeals in this case makes no mention of the errors of the lower court that were patent upon the face of the record, even though such matters were called to the court's attention in oral argument and cases were submitted in support. Accordingly, great injustice will be done unless this honorable court sees fit to issue a writ of certiorari to the Fifth Circuit Court of Appeals for the purpose of reviewing the failure of that court to reverse the order of the lower court in denying petitioner's motion for a directed verdict in the first place, denying petitioner's motion for a judgment notwithstanding the verdict in the second place, denying petitioner's motion for a new trial in the third place, and in failure to properly instruct the jury as to the Iowa law, which failure resulted in influencing the jury to bring in an award for the respondents on the basis of a misapprehension of the law that the jury should apply to the facts found.

CONCLUSION

The courts have a basic duty to protect the rights of parties before them and to assure that the fundamental rights to a trial before the courts in accordance with the proper law shall not be abridged. In this case the petitioner's rights have been abridged and it has not had an opportunity to have this dispute determined in accordance with the applicable law. It is important to the administration of justice in the Federal courts that the decision below be reviewed and reversed by this Court so that it

will not stand as a precedent or reference to an improper statement of the applicable Iowa law. To insure consistency in the United States Courts of Appeal as to the proper law to be applied in cases before them it is important that this court review the errors of the courts below in this case so that the decisions of the United States Court of Appeals for the Fifth Circuit can be in conformity with what the Iowa law is perceived and held to be, not only in Iowa and the Court of Appeals for the Eighth Circuit, but in the other Federal circuits generally.*

ROBERT H. WALKER;
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Keokuk, Iowa,
Attorneys for Petitioner.

Of Counsel:

MORRIS E. WHITE,
MICHAEL L. KINNEY,
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Citizens Building,
Tampa, Florida.

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*See Rule 19 of the Revised Rules of the Supreme Court of the United States (App. A31).

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 17397.

FRUIT INDUSTRIES, INC.,
Appellant,

versus

STELLA PETTY, as Administratrix of the Estate of JULIUS E. PETTY, deceased, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(June 29, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

HUTCHESON, Chief Judge: This appeal is from three judgments which were recovered by the plaintiffs in actions growing out of an automobile truck-trailer collision which occurred in Iowa. In one of the actions recovery was sought by the administrator of the estate of Julius E. Petty who was killed while driving the car involved in the accident. The second action was for the death of Joe Forrest Petty, age 13, minor son of Julius E. Petty who was a passenger in his father's car. The third action was brought by the owner of certain furs which were being transported by Petty and which were destroyed in the accident. The three actions were consolidated for

trial and likewise have been consolidated for appeal. We shall designate the parties as they were in the lower court.

The complaints alleged in general terms the negligence of the defendant and further, among other Iowa statutes, specifically pleaded the violation of Section 321.303[1] of the Iowa statute dealing with passing another vehicle proceeding in the same direction.

On the record made, therefore, plaintiff contended below and contends here that defendant was guilty of negligence, both under and apart from the statute, in endeavoring to overtake and pass the Standard Oil truck which was proceeding in the same direction, and that his act in so doing created a sudden emergency which caused Petty, the driver of the car, to apply his brakes and thereby caused his car to skid in front of, and into contact with, said truck.

Stated in the most favorable light for the plaintiff, that the record permits, the evidence is as follows:

On December 21, 1956, at or shortly after 9 A.M., Julius E. Petty, the husband of Stella Petty, was driving his automobile north on Highway 218, approximately nine miles north of Donnellson, Iowa, and his minor son, Joe Forrest Petty, was riding with him. At the same time and place a truck and trailer, owned and operated by

[1] "No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction."

the defendant, Fruit Industries, Inc., was proceeding south on the highway; this equipment of the defendant had been following a Standard Oil truck for at least a mile and had been gradually gaining on it. These vehicles passed the crest of a hill on which the residence of Louis Holtkamp was situated and were coming down the slope when defendant's truck-trailer commenced pulling into its left lane in an attempt to pass Standard's vehicle which was then traveling at 45 miles per hour. The speed of defendant's rig at that time was estimated by Harold Willis Mitchell, driver of Standard's truck, as between 50 and 55 miles per hour. Mitchell testified that defendant's vehicle, while endeavoring to pass him, was driven completely into the east or left lane on which lane Julius Petty was approaching from the south; having just come over the crest of a hill, with Standard's truck in the west lane, the entire highway was blocked and plaintiffs contended and the jury found that Petty was suddenly confronted with a dire emergency and in his action thereafter was not guilty of, or chargeable with, negligence.

When Petty was still 200 or 300 feet away from Standard's vehicle, his car went into a skid and Petty lost control. At that time defendant's vehicle was in the process of going back in its proper lane. Petty's car continued to skid and went to the right or east shoulder and then swung directly across the highway onto the west shoulder and collided with Standard's truck.

At the time and place of the accident it was foggy and visibility was quite limited. All of the vehicles involved in the accident had their lights on. At the close of plaintiffs' and again at the close of defendant's case, defendant moved for verdict in its favor, and, the motions denied, the case was submitted to the jury on a charge to which

no exceptions were taken, and there was a verdict in each case for plaintiffs.

After the jury returned verdicts for each of the plaintiffs, defendant filed motions to set the verdict aside and in the alternative moved for a new trial. Each of the motions were denied and this appeal resulted.

Here, assigning four errors[2] and arguing that the evidence was insufficient to enable a jury to find that negligence of the defendant proximately caused plaintiffs' damages, appellant earnestly contends that when all the evidence is considered, as it is required to be, in the light most favorable to plaintiffs, the conclusion must be reached that a jury of reasonable men could not find that negligence on the part of defendant's driver was the proximate cause of the collision and the damages for which plaintiffs sued.

While the accident occurred in Iowa and the suit was tried in Florida, and in the beginning conflict of laws questions bulked large in the case, no objection was made or exception taken to any of the rulings or the charges of the district judge dealing therewith, and, except as Iowa statutes and decisions have a bearing on the only question the assignments raise, whether under the evidence there was negligence or contributory negligence as matter of

2 (1) In all three cases the trial court erred in denying defendant's motions for directed verdict.

(2) In Case No. 3200, the trial court erred in failing to find as a matter of law that plaintiffs' decedent was guilty of contributory negligence under the laws of the State of Iowa.

(3) In all three cases the trial court erred in denying defendant's motion to set aside the verdict and, in the alternative, for a new trial.

(4) In Cases Nos. 3200 and 3201, the trial court erred in failing to find that the verdicts therein were excessive.

law and whether the verdicts were excessive, the fact that the accident occurred in Iowa and was tried in Florida is of no importance in the case. It is true that appellant urges upon us that plaintiffs must rely on circumstantial evidence for a verdict and that in the circumstances of this case the burden Florida law places on plaintiffs was too heavy to be borne; and that appellees, citing *Ling* v. *Edenfield*, 211 F.2d 705; *Pogue* v. *The Great Atlantic & Pacific Tea Co.*, 242 F.2d 575; *Dallas Ry. & Terminal Co.* v. *Sullivan*, 108 F.2d 581, and other cases from this circuit (but see *Blanche Dick* v. *New York Life Insurance Co.*, U.S. , 5-18-59), insist that the sufficiency of the verdict is governed by the rule established generally in the federal courts. In addition, arguing with confidence that, entirely apart from circumstantial evidence, the undisputed proof showing defendant's negligence and violation of the Iowa passing statute in attempting to pass established its liability, appellees cite in support *Cunningham* v. *Court*, 82 N.W.2d 292 and other Iowa cases.

Finally, assuming for the purpose of the argument that the so-called Florida rule applies, appellees, citing Florida case in support, *Dehon* v. *Hedit*, 38 So.2d 39, *Voelker* v. *Life & Cas. Co.*, 73 So.2d 403, and *Byers* v. *Gunn*, 81 So.2d 723, argue with assurance that under the Florida rule the evidence in this was quite sufficient to support the verdict.

On the question of contributory negligence *vel non* of the deceased driver, appellees cite the Iowa case, *Aitchison* v. *Reter*, 64 N.W.2d 923, holding that "The question of contributory negligence is peculiarly one of fact and not of law, save only in those exceptional cases where the plaintiff's want of reasonable care is so manifest and flagrant as to at once convince all fair and candid minds that he did not exercise the caution for his own safety

which marks the conduct of ordinarily prudent men."[3] and *Cook Paint & Varnish Co.* v. *Hickling*, 76 F.2d 719, where, as here an emergency situation was presented.

We find ourselves in full agreement with appellees' view that the evidence in this case fully supports the verdict that defendant was, and plaintiffs' decedent was not, guilty of negligence. For the moment, putting the Iowa passing statute aside and considering the case from the standpoint of the general principle of negligence, that one who on a public highway undertakes a passing maneuver is held in ordinary circumstances to a strong duty of care to set it on foot and complete it without injury to others,[4] and when as the undisputed proof shows here, he attempts it in a fog and causes or brings about a collision, the evidence of negligence must be regarded as not only sufficient to support a jury verdict of negligence but almost, if not quite, sufficient to demand one.[4] Nor does defendant stand any better on its claim in Cause No. 3200 that plaintiffs' decedent, driving in the same fog and at a high speed was guilty of contributory negligence as matter of law. In Iowa, *Mongar* v. *Barnard*, 82 N.W.2d 765, *Kisling* v. *Theirman*, 243 N.W. 552, *Smith* v. *Darling & Co.*, 56 N.W.2d 47, and generally elsewhere, where one is confronted through no fault of his own with a sudden emergency, his actions in extremis are not to be judged as they would be in ordinary circumstances. Under that rule, the evidence certainly supported, indeed it almost demanded, the verdict that Petty was not contributorily at fault.

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3. 5A Am. Jur., "Passing", Secs. 351-2, pp. 446-7; Sec. 367, p. 458.

4. 5A Am. Jur., "Automobiles", Secs. 334-5, pp. 438-9.

Of the specification that in cases Nos. 3200-3201, the court erred in failing to find the verdicts excessive, it is sufficient, we think, to say that whether, as appellant argues, the decisions of the Iowa courts dealing with the question whether and when a verdict can and should be relieved against on the ground of excessiveness, are followed, or whether, as appellees seem to think, it is governed by decisions of the federal courts, there is no reasonable basis for the claim that the verdicts are vulnerable to the attacks upon them... It is certainly true, and this court has held in *Kilmer et al.* v. *Gustafson*, 211 F.2d 781, a case tried in Florida on a collision accident happening in Iowa, that the suit, being a death action, is governed by the Iowa statute creating the action. It is also true, though, as stated in that case, with many cases cited in support, that a federal appellate court does not undertake to determine whether a verdict is excessive in fact but only whether it is excessive in law. Cf. *New Amsterdam Cas. Co.* v. *Wood*, 253 F.2d 71; *Atlantic Coast Line* v. *Pidd*, 197 F.2d 153; *Whiteman* v. *Pitrie*, 220 F.2d 914 and *Atlantic Coast Line* v. *Kammerer*, 293 F.2d 115.

When we turn from these cases to the Iowa cases, we find that the only difference between them is that, while the courts of both jurisdictions declare that, in the absence of a showing of passion or prejudice, a verdict will not be set aside for excessiveness unless the amount is so large as to shock the conscience, *Soreide* v. *Vilas & Co.*, 78 N.W.2d 41, the Iowa Supreme Court does not expressly distinguish excessiveness in fact from excessiveness in law and thus apparently reserves for itself a wider latitude of review.

On the other hand, in *DeToskey* v. *Ruan Transp. Corp.*, 40 N.W.2d 37, the court said in substance that the Supreme Court must keep in mind that it is in the province

of the jury to determine amounts to be allowed in any particular case and a verdict ought not to be disturbed unless it is so flagrantly excessive as to raise a presumption that it was the result of passion and prejudice, and not of honest judgment. Cf. *Hackman* v. *Beckwith*, 64 N.W.2d 275.

Finally, as the federal courts have, the Iowa courts have, declared that comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness vel non in a particular case and that each case must be determined on its own facts.

Under the facts of this case and in the light of the controlling principles, no showing is made, we think, for setting aside the verdicts for excessiveness.

No error appearing, the judgments are AFFIRMED.

A true copy.

Test: Edward W. Wadsworth,
Clerk, United States Court of Appeals, Fifth Circuit.

By /s/ Clair R. Janies,
(Seal) Deputy.

New Orleans, Louisiana,
July 9, 1959.

JUDGMENT.

Extract from the Minutes of June 29, 1959.

FRUIT INDUSTRIES, INC.,

No. 17397 versus

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, Deceased et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, Fruit Industries, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

Case No. 17,397.

FRUIT INDUSTRIES, INC.,
Appellant,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, Deceased, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

PETITION FOR REHEARING.

To The United States Court of Appeals for the Fifth Circuit:

The Petitioner, Fruit Industries, Inc., by its undersigned attorney, respectfully petitions this Court to grant it a rehearing on the opinion rendered in this cause on the 29th day of June, 1959, upon the following grounds:

I.

The decision of the Court considers only the question whether the act of Petitioner-Appellant's driver was negligence, an issue not raised by Petitioner-Appellant on this appeal, and assumes affirmatively without discussion the issue which Petitioner-Appellant urged on appeal—that is, that the evidence in this cause was entirely insufficient to

support a jury finding that the act of Petitioner-Appellant's driver was the *cause* of the accident from which Appellees' damages arose.

II.

The decision of the Court ignores the Iowa rule that contributory negligence which bars recovery is *any* negligence upon the part of the Plaintiff which contributed in *any way* or in *any degree* directly to his injuries.

A written brief in support of this petition for rehearing is filed herewith.

For the above reasons, Petitioner-Appellant respectfully prays that this Court grant a rehearing in this cause.

Respectfully submitted,

MICHAEL L. KINNEY
Attorney for Petitioner-Appellant

Of Counsel:

FOWLER, WHITE, GILLEN, YANCEY AND HUMKEY
1002 Citizens Building
Tampa 2, Florida

CERTIFICATE OF GOOD FAITH.

I DO CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay.

MICHAEL L. KINNEY
Attorney for Petitioner-Appellant

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

Case No. 17,397.

FRUIT INDUSTRIES, INC.,
Appellant,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, Deceased, et al.,
Appellees.

Appeals from the United States District Court
for the Southern District of Florida.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

The following brief is submitted in support of the petition of Appellant, Fruit Industries, Inc., for a rehearing on the opinion rendered in this cause on the 29th day of June, 1959. The parties will be referred to respectively as "Appellant" and "Appellees".

GROUNDS.

I.

The decision of the Court considers only the question whether the act of Petitioner-Appellant's driver was negligence, an issue not raised by Petitioner-Appellant on this appeal, and assumes affirmatively without discussion the issue which Petitioner-Appellant urged on appeal—that is,

that the evidence in this cause was entirely insufficient to support a jury finding that the act of Petitioner-Appellant's driver was the *cause* of the accident from which Appellees' damages arose.

II.

The decision of the Court ignores the Iowa rule that contributory negligence which bars recovery is *any* negligence on the part of the Plaintiff which contributed in *any way* or in *any degree* directly to his injuries.

ARGUMENT.

GROUND I.

The decision of the Court considers only the question whether the act of Petitioner-Appellant's driver was negligence, an issue not raised by Petitioner-Appellant on this appeal, and assumes affirmativley without discussion the issue which Petitioner-Appellant urged on appeal—that is, that the evidence in this cause was entirely insufficient to support a jury finding that the act of Petitioner-Appellant's driver was the cause of the accident from which Appellees' damages arose.

Appellant's argument on this appeal with respect to all three consolidated cases was not that the evidence was insufficient to support a jury verdict of negligence on the part of Appellant's driver. Rather, Appellant argued that the evidence was insufficient to support a finding of *causation*—regardless of negligence on the part of Appellant's driver.

Appellant pointed out in its brief that essentially there was no dispute at the trial as to the circumstances surrounding the accident in question. There was conflicting

testimony as to the range of visibility at the time Appellant's driver pulled out to pass the Standard Oil truck, but Appellant assumed the evidence as to this fact in the light most favorable to Appellees. Under Appellant's theory on appeal, the issue was not whether Appellant's driver failed to exercise due care in pulling out to pass at the time and under the circumstances proven. *Appellant argued and here earnestly contends that the issue is whether the act of Appellant's driver caused the accident from which Appellees' alleged damages arose.*

As established at the trial, and as stated by this Court in its opinion rendered on this appeal, the facts were that Appellees' vehicle suddenly skidded and swerved across the highway at a time when Appellant's vehicle was in the process of going back in its proper lane after starting to pass a Standard Oil truck preceding it. *This is the only fact possibly connecting Appellant's truck to the accident.* Appellant earnestly contends that the issue is whether this circumstance, considering the distance between the vehicles, the slippery condition of the highway, visibility, and the speed of Appellees' vehicle, was sufficient grounds upon which a jury could find that the act of the Appellant's driver *caused* the accident. The undisputed evidence showed that visibility was limited, there was a heavy fog, the black-top highway was slippery, and Appellees' driver, Julius E. Petty, was proceeding at least 60 miles an hour under these conditions.

The jury's verdict necessarily was based on its finding that the act of Appellant's driver *caused* the accident. Only after such a finding could the care or lack of care exercised by Appellant's driver be considered for the purpose of determining liability. It is this preliminary finding of causation which Appellant urges could not be supported by the evidence in this case. In support of its con-

tention. Appellant directed this Court's attention to a case arising in the state of Wisconsin involving facts almost identical to the facts involved in the instant case, except that the Wisconsin case did not involve limited visibility and bad road conditions. Appellees did not cite a single case to this Court involving a similar situation in which a jury's verdict was sustained.

The Wisconsin decision was rendered in the case of *Nitka v. Van Camp*, 256 Wis. 119, 40 N.W.2d 570 (1949). In that case defendant's automobile was following another automobile, both traveling in the opposite direction from plaintiff's vehicle. Defendant started to pass on a straight and level road, clear of ice, snow, and water, but then pulled back into his own lane. Plaintiff's wife riding in his automobile testified that she saw four lights approaching and that the distance between plaintiff's car and defendant's car at that time was approximately 125 feet. Plaintiff testified that he also saw defendant's car in his (plaintiff's) lane of travel when he was about 125 to 150 feet away, and that he then swung his car onto the right shoulder of the road. Plaintiff's automobile then swung across the road and collided with the automobile defendant was following.

The trial court, upon this evidence presented, directed a verdict for defendant. On appeal the Wisconsin appellate court affirmed on the ground that the evidence was insufficient to show that the act of defendant in attempting to pass *caused* the accident. The Court said:

> "Considering the testimony most favorable to the plaintiffs, that when they were approximately 125 feet from the Neumann automobile [defendant's] car which was 'close' behind the Neumann car suddenly turned into their lane of traffic and created an emergency,

neither the testimony or the physical facts support this conclusion."

The Court concluded:

> "There is no credible evidence of any negligence on the part of the defendant. * * * *There is no testimony in the record from which any inference can be drawn that would result in a reasonable conclusion as to what caused the accident.* The trial court properly directed a verdict in favor of the defendants." (Emphasis added)

In the case before this Court on appeal, the undisputed facts show that Appellant's driver did pull out to pass the Standard Oil truck he was following, then returned to his own lane, abandoning his attempt to pass. At the time Appellant's driver was pulling back into his own lane, Appellees' automobile suddenly swerved and skidded. The undisputed evidence shows that the distance between Appellees' automobile and Appellant's truck at this point was at least 200 to 300 feet. Based on this evidence, Appellees contended that the act of Appellant's driver in pulling out to pass caused Julius Petty to believe himself in a sudden emergency and that his reaction thereto caused the accident. Unlike the Wisconsin case, Appellees' theory requires the assumption that Petty *saw* Appellant's truck *and* applied his brakes to avoid what he *thought* was an impending collision. Yet the Wisconsin court, even with direct testimony on this point by the driver involved, held that causation was not sufficiently shown.

Appellant here contends likewise that the evidence was totally insufficient, simply on the basis of proximity in time and events, to support a jury finding of causation. In addition to the distance between the vehicles in question, Appellant points to the fact that the highway was slippery, that there was a heavy fog, and that Appellees

driver was proceeding at least 60 miles an hour. How can it be said on this undisputed evidence that a jury could find a *preponderant inference* that the act of Appellant's driver *caused* Appellees' automobile to skid and swerve?

In its opinion rendered June 29, this Court considered only whether the act of Appellant's driver was negligent under the circumstances. Appellant at no time in its brief or in oral argument discussed the care or lack of care exercised by its driver—under Appellant's theory, this issue need not be considered at all. Because this Court did not consider Appellant's whole argument on appeal, Appellant earnestly requests that a rehearing be granted in this cause.

GROUND II

The decision of the Court ignores the Iowa rule that contributory negligence which bars recovery is any negligence upon the part of the Plaintiff which contributed in any way or in any degree directly to his injuries.

In its opinion, this Court dismissed Appellant's argument that Appellees' driver was guilty of contributory negligence as a matter of law with the statement that:

> "Nor does the defendant stand any better on its claim in cause No. 3200 that plaintiff's decedent driving in the same fog and at a high speed was guilty of contributory negligence as a matter of law. In Iowa, * * * and generally elsewhere, where one is confronted through no fault of his own with a sudden emergency, his actions in extremis are not to be judged as they would be in ordinary circumstances. Under that rule, the evidence certainly supported, indeed it almost demanded the verdict that Petty was not contributorily at fault."

In its conclusion this Court assumed that the evidence was sufficient to support a finding of causation—that is,

that the act of Appellant's driver in pulling out to pass *caused* Appellees' driver to swerve in front of the Standard Oil truck by making him *think* he was in a "sudden emergency". Thus, this Court again dismissed without consideration the crucial argument which Appellant asserted on this appeal. Appellant showed that Appellees' driver was *prima facie* guilty of negligence under Iowa law. Appellant further argued that the evidence was insufficient to establish that this *prima facie* act of negligence was *caused* by the action of Appellant's driver, negligent or not. Everything Appellant has heretofore said with respect to the evidence on the issue of causation applies here. Appellant respectfully submits that this Court failed to consider the whole case presented on this appeal by Appellant.

But even assuming that causation was sufficiently shown, under the Iowa rule of contributory negligence the action of Appellees' driver in the so-called emergency and in helping create it was contributory negligence as a matter of law. The Iowa rule is that contributory negligence, to prevent recovery, need not be a proximate cause of plaintiff's injuries or damages; the relationship between plaintiff's injuries and his negligence need not be more than *causal*. Contributory negligence in Iowa is *any* negligence on the part of the plaintiff which contributed in *any way* or in *any degree* directly to his injuries. *Hamilton* v. *Boyd*, 256 N.W. 296 (Iowa 1934); *Howie* v. *Ryder and McGloughlin*, 58 N.W.2d 389 (Iowa 1953).

The undisputed evidence shows that Julius Petty was proceeding at least 60 miles an hour on a highway which was wet and slippery, when visibility was limited. If Petty saw Appellant's truck, as Appellees contend, and thought he was in danger of impending collision, surely reasonable minds could not find that the speed of Appellees' vehicle under the existing road conditions played no

part in creating the imagined emergency. Petty was 200 or 300 feet away from the Standard Oil truck when his vehicle suddenly skidded and swerved; *had he continued in his own lane of traffic, this accident would not have happened.* Instead he applied his brakes (we assume) so abruptly and while going at such a high rate of speed that he completely lost control of his vehicle.

Appellant urges that Mr. Petty was indisputably guilty of negligence which contributed *at least to some degree* directly to his injuries. Under Iowa law, such contributory negligence absolutely bars recovery. Appellant respectfully submits that this Court should grant a rehearing in this matter and reverse the judgment in case No. 3200 on the ground that recovery is barred by the contributory negligence of Appellee's driver.

CONCLUSION.

The evidence in these cases was entirely insufficient to support a finding that an imagined emergency created by Appellant caused the accident in question. This issue, urged by Appellant on appeal, was apparently not considered by this Court. Instead, the Court based its opinion on a finding that the act of Appellant's driver was negligence—a determination not necessary under Appellant's theory of the case and an issue not argued by Appellant on appeal.

Even if the evidence was sufficient to support a finding of causation, under the Iowa rule as to contributory negligence recovery in case No. 3200 must necessarily be barred as a matter of law by the negligence of Julius Petty which helped create the imagined emergency and the negligence

of Petty in reacting to the imagined emergency—negligence which contributed to his death at least to some degree.

Respectfully submitted.

MICHAEL L. KINNEY,
Attorney for Petitioner-Appellant.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing and Brief in Support of Petition was furnished to Vernon W. Evans, Jr. of Shackleford, Farrior, Stallings, Glos & Evans, attorney for Appellees, by this day of July, 1959.

Attorney.

ORDER DENYING REHEARING.

Extract from the Minutes of September 11, 1959.

FRUIT INDUSTRIES, INC.,

No. 17397. versus

STELLA PETTY, As Administratix of the Estate of JULIUS E. PETTY, Deceased, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

(Motion of Appellant for Stay of the Mandate Filed September 24, 1959. Edward W. Wadsworth, Clerk.)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,397.

FRUIT INDUSTRIES, INC.,
Appellant,

vs.

STELLA PETTY, as Administratix of the Estate of JULIUS E. PETTY, Deceased, et al.,
Appellees.

MOTION FOR STAY OF MANDATE.

To the Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

Defendant, Appellant respectfully presents this, its application for, and moves the Court to enter, an Order staying the issuance of mandate in this case, under the provisions of Section 2101 (f), Title 28, U. S. Code, because it is the bona fide intention of the appellant to make timely application to the Supreme Court of the United States for writ of certiorari.

The decision to file petition for certiorari to this Court in the United States Supreme Court was made by appellant after consultation with two sets of attorneys in Florida and Iowa on late Monday, September 21, 1959, at which

time it was impossible to file this motion for stay of mandate within 10 days after the denial of appellant's petition for rehearing.

It will work an undue hardship on appellant if the issuance of the mandate is not stayed for a reasonable time pending filing of petition for certiorari.

Boyd, Walker & Concannon,
609 Blondeau St., Keokuk, Iowa,

and

Fowler, White, Gillen, Humkey & Trenam,
1002 Citizens Bldg., Tampa, Florida,
By s Michael L. Kinney,
Attorneys for Appellant.

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, this day personally appeared Michael L. Kinney, who being by me first duly sworn, deposes and says that he is attorney for appellant in this matter; that he has served Shackleford, Farrior, Stallings, Glos & Evans, attorneys for appellees, P. O. Box 3324, Tampa, Florida, copy of the above and foregoing Motion for Stay of Mandate by depositing the same in the United States mails addressed as above stated this 22nd day of September, 1959.

s Michael L. Kinney.

Sworn to and subscribed before me this 22nd day of September, 1959.

s Shirley N. Elliott,
Notary Public, State of
Florida at Large.

My Commission expires Feb. 28, 1960.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,397.

FRUIT INDUSTRIES, INC.,
Appellant,

vs.

STELLA PETTY, as Administratix of the Estate of JULIUS E. PETTY, Deceased, et al.,
Appellees.

MOTION FOR ISSUANCE OF MANDATE, OR, IN THE ALTERNATIVE, FOR REQUIREMENT OF ADDITIONAL SECURITY AND LIMITATION OF PERIOD OF STAY.

To the Honorable Chief Judge and Judges of the United States Court of Appeals for the Fifth Circuit:

The appellees move the Court to instruct the Clerk to forthwith issue the mandate of this Court affirming the judgments entered on jury verdicts by the United States District Court for the Southern District of Florida, on May 9, 1958, or, in the alternative to limit the stay sought herein by appellant to thirty (30) days from the date of the denial of the rehearing and to require the appellant, as a condition to such stay, to submit additional security in the amount of $1,500.00 in favor of J. B. Petty, Sr., as Administrator of the Estate of Joe Forrest Petty, deceased, and $1,000.00 in favor of the appellees Ernest Baird and Joy Jeffrey, and

in support of such requests for security and a limitation on the period of stay, show unto the Court as follows:

(1) The judgments rendered in favor of the appellees Stella Petty, J. B. Petty, Sr., and Ernest Biard and Joy Jeffrey, with interest and costs now total $42,241.31, $24,877.20, and $14,619.55 respectively. There are presently outstanding supersedeas bonds in their favor in the respective amounts of $45,000.00, $25,000.00 and $15,000.00.

(2) The appellees J. B. Petty, Sr., and Baird and Jeffrey accordingly are inadequately protected against loss of the additional interest accumulating and the additional costs to be borne by them in opposing the petition for writ of certiorari, and are accordingly entitled to the additional security mentioned.

(3) Thirty (30) days is a reasonable period for the appellant to proceed further in this cause, and a longer stay, which would only serve to delay the filing of a petition for writ of certiorari and thereby further extend these prolonged proceedings, is unnecessary.

s Thomas C. MacDonald, Jr.,
Attorney for Appellees.

Of Counsel:

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Tampa, Florida,
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Fitzhugh Building,
Batesville, Arkansas.

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, this day personally appeared Thomas C MacDonald, Jr., who being by

me first duly sworn, deposes and says that he is an attorney for appellees in this matter; that he has served Michael L. Kinney, an attorney for appellant, Citizens Building, Tampa, Florida, copy of the above and foregoing Motion by depositing the same in the United States mails addressed as above stated this 23rd day of September, 1959.

s Thomas C. MacDonald, Jr.

Sworn to and subscribed before me this 23rd day of September, 1959.

s Elinor Legters,
Notary Public State of Florida.

(Notarial Seal.)

My commission expires November 19, 1961.

(Stay of Mandate Filed September 28, 1959.)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17,397.

FRUIT INDUSTRIES, INC.,
Appellant,

vs.

STELLA PETTY, as Administratix of the Estate of JULIUS E. PETTY, Deceased, et al.,
Appellees.

STAY OF MANDATE.

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the

date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 28th day of September, 1959.

s/ J. C. Hutcheson, Jr.,
United States Circuit Judge.

STATUTES INVOLVED.

The following sections of the Code of Iowa were involved:

321.285. Speed restrictions. Any person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, such driver having the right to assume, however, that all persons using said highway will observe the law.

The following shall be the lawful speed except as hereinbefore or hereinafter modified, and any speed in excess thereof shall be unlawful:

1. Twenty miles per hour in any business district.

2. Twenty-five miles per hour in any residence or school district.

3. Forty miles per hour for any motor vehicle drawing another vehicle.

4. Forty-five miles per hour in any suburban district. Each school district as defined in subsection 59 of section 321.1 shall be marked by distinctive signs as provided by the current manual of uniform traffic control devices adopted by the state highway commission and placed on the highway at the limits of such school district.

321.298. Meeting and turning to right. Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right.

321.303. Limitations on overtaking on the left. No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.

321.304. Prohibited passing. No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed for a distance of approximately seven hundred feet.

2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so signposted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing.

3. Where official signs are in place directing that traffic keep to the right or a distinctive center line or off-center line is marked, which distinctive line also so directs traffic as declared in the sign manual adopted by the state highway commission.

Rule 51 of the Federal Rules of Civil Procedure:

Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULES OF SUPREME COURT.

Rule 19. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of

appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 24 1959
JAMES R. BROWNING, Clerk

No. 500.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

FRUIT INDUSTRIES, INC.,
Petitioner,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, DECEASED, J. B. PETTY, SR., As Administrator of the Estate of JOE FORREST PETTY, DECEASED; and ERNEST BAIRD and JOY JEFFREY, Individually and As Partners, d/b/a BATESVILLE FUR COMPANY, *Respondents.*

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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No. 500.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

FRUIT INDUSTRIES, INC.,
Petitioner,

vs.

STELLA PETTY, As Administratrix of the Estate of JULIUS E. PETTY, DECEASED, J. B. PETTY, SR., As Administrator of the Estate of JOE FORREST PETTY, DECEASED; and ERNEST BAIRD and JOY JEFFREY, Individually and As Partners, d/b/a BATESVILLE FUR COMPANY, *Respondents.*

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The unanimous opinion of the United States Court of Appeals for the Fifth Circuit is reported at 268 F.2d 391, and is reprinted at pages one through eight of the appendix to the petition.

JURISDICTION.

The accuracy of the factual averments under this heading in the petition is not controverted. However, none of the factors enumerated in Rule 19 1(b), Rules of the Supreme Court, are present to support granting of the writ. While bottoming the petition on a purported misapplication of state substantive law, petitioner seeks in reality a second appeal. In opposition, it is therefore necessary to discuss the operative facts at a greater than customary length.

QUESTIONS PRESENTED.

Although four questions, one of which contains three parts, are stated by petitioner to be presented, two fundamental questions are actually suggested. These are:

(1) Whether or not under applicable law and the specific facts of this case, the petitioner was entitled to a directed verdict or a dismissal in the trial court in one or more of the three causes in issue by reason of the alleged failure of the respondents to prove that negligence of petitioner's driver was the proximate cause of the damages sustained by them, or by reason of the proof on the question of contributory negligence.

(2) Whether or not under the applicable law and the specific facts of this case, the trial court committed and the United States Court of Appeals for the Fifth Circuit approved instructional error in one or more of the three causes with reference to the burden of proof on the issue of contributory negligence.

STATUTES AND RULES INVOLVED.

Certain of the statutes and rules of relevance in this proceeding are set forth in the appendix to petitioner's brief. However, the following rule is also applicable:

Rule 8 c, Federal Rules of Civil Procedure:

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

STATEMENT.

The petitioner was defendant in the District Court and appellant in the Court of Appeals. The respondents were plaintiffs and appellees respectively. In this brief the parties will be denoted by their positions in this Court. These abbreviations will be used: R.—The printed record in the Court of Appeals. App.—Appendix to the petition.

The actions below resulted from an automobile accident occurring in Iowa, wherein Julius E. Petty, husband of the respondent Stella Petty, and his son, Joe Forrest Petty, the thirteen year old grandson of the respondent J. B. Petty, Sr., were killed, and a valuable cargo of furs being transported by Julius E. Petty and owned by the respondents

Ernest Baird and Joy Jeffrey was destroyed. Apart from the devastating consequences of the accident, these cases presented in essence merely a head-on collision negligence action wherein issue was joined on the questions of negligence and contributory negligence of the principals, the dispute was factual in nature, and verdicts were returned for the plaintiffs.

The following recitation of the facts is properly in a light favorable to respondents as the jury was entitled to find. At approximately 9:00 A. M. on December 21, 1956, Julius E. Petty was driving north on Highway 218, approximately nine miles north of Donnellson, Iowa, Joe Forrest Petty being a passenger in the car (R. 27). Meanwhile a large tractor and trailer owned by the petitioner was proceeding south on this highway (R. 27), following a Standard Oil Company truck (R. 75). These vehicles passed the crest of a hill (R. 75), and were coming down the slope when the petitioner's tractor and trailer, traveling between 50 and 55 miles per hour (R. 77), pulled completely into its left lane to pass the Standard vehicle, which was then traveling at 45 miles per hour (R. 76, 77). At this moment Julius Petty approached from the south (R. 27), having just come over the crest of another hill (R. 306). Thus with petitioner's vehicle in the east lane and the Standard truck in the west lane, the entire highway was blocked (R. 320), and Petty was suddenly confronted with a dire emergency as the two trucks bore down on him. The highway was built on a steep embankment at the location in question (R. 121, 139, 262, 282), the one on the west side or the side to Petty's left being approximately 15 to 17 feet in height (R. 121).

When Petty was still 200 to 300 feet from the Standard truck, his car went into a skid and Petty lost control (R. 76). The Standard driver and the petitioner's driver,

both experienced truck drivers, testified that the action of the Petty vehicle indicated application of the brakes (R 76, 320). At that time, the petitioner's tractor and trailer was in the process of going back into its proper lane, but it had not gotten back completely at the time of the collision (R. 80). Petty's car continued to skid and went to his right or east shoulder, then swinging directly across the highway onto the west shoulder (R. 94) and finally collided with the Standard truck (R. 83, 90). The Petty car then caught fire (R. 85). The father was apparently killed instantly and the boy died without regaining consciousness (R. 27, 276-277).

At the time of the accident, the little valley was foggy and the visibility was quite limited (R. 136, 152, 153, 258, 301). The road was described by one of the petitioner's witnesses as, "Just a little damp." (R. 297). All of the vehicles involved in the accident had their lights on (R. 320). There was evidence that it was clearer to the south from which direction Petty came (R. 285). The witness Mitchell estimated Petty's speed at not over 60 miles per hour when first seen (R. 83), there being no speed limit at the place in question (R. 339).

ARGUMENT.

The questions raised by the petition relate to the right of the petitioner to a directed verdict or dismissal because of purported requirements of the Iowa law with reference to the proof of proximate causation and to the pleading and proof of contributory negligence, and to certain alleged instructional errors by the trial court concerning the issue of contributory negligence. This case in fact presents no substantial ground for further review, it being, apart from

its lethal results, an automobile accident case typical of the type litigated each day in the United States, involving only the rights of the parties immediately interested. The trial court and the United States Court of Appeals for the Fifth Circuit correctly applied the appropriate law in all particulars, and the petitioner's contentions in this Court are not only without merit, but also represent an effort to completely alter its position from that adopted by it in the trial court and the Court of Appeals.

The Decision Below Is Clearly Correct.

Proximate Causation.

The petitioner claims a right to a directed verdict in the trial court under *Iowa* law, by reason of respondents' failure to establish proximate causation by a quantum of evidence sufficient to satisfy the *lex loci delicti*. Interestingly enough, as reflected by the opinion of the Court of Appeals (App. A 5), the petitioner there relied on a purported Florida rule. Nevertheless, the Court of Appeals properly found a jury question to have been presented under Iowa law or Florida law, or under a rule existing in federal courts.

The record reveals that less than four seconds before he died (based upon the speeds and distances estimated by the witness Mitchell), Julius Petty was unexpectedly confronted with the awesome spectacle of two large vehicles bearing down upon him and completely blocking the highway to his front. Sharp embankments appeared on either side. Both eye-witnesses testified that the sudden movement of the Petty vehicle indicated that he put on his brakes. No one suggested any other reason as the cause of the movement of the Petty vehicle. In an effort to stop his vehicle he skidded, eventually veered at the last instant, and struck not the petitioner's vehicle but the on-rushing

vehicle of the Standard Oil Company. It is difficult to conceive of a case less subject to removal from the province of the jury. Indeed the Court of Appeals in a rare commentary on the proof characterized the evidence in this case as favoring the respondents to the point that it was "not only sufficient to support a jury verdict, but almost, if not quite, sufficient to demand one." (App. A 6).

Petitioner's driver clearly, and indeed virtually admittedly, violated Section 321.303, Iowa Statute (App. A 30), by commencing to pass with the road obstructed and when he could not and did not return to his side before coming within 100 feet of the Petty car. In the absence of evidence of a legal excuse, of which none was offered, this action was negligence *per se* under Iowa law, *Cunningham v. Court*, 248 Iowa 654, 82 N.W.2d 292 (1957). Obviously this created the emergency leading to the skid and the death of Petty and his young son. Despite the virtual certainty of the evidence, respondents' burden extended only to the creation of a jury issue. "The established rule in this state has been that whether negligence is a proximate cause of an injury is always a question for the jury when different minds might reasonably reach different conclusions." *Lindquist v. Des Moines Union Ry. Co.*, 239 Iowa 356, 30 N.W.2d 120, 127 (1947); see also *Stiefel v. Wandro*, 246 Iowa 807, 68 N.W.2d 53 (1955), to the same effect. Clearly any course other than submission of the cause to the jury would have been erroneous.

Contributory Negligence.

Although none of the respondents pleaded their freedom or that of the decedents from contributory negligence, and such omissions are now said to be fatal, the petitioner promptly filed an answer in case number 3200 (the Julius Petty case), advancing the defense of Petty's contributory

negligence as a bar to recovery (R. 13). No such defense was set forth in its answer in case number 3201 (the Joe Forrest Petty case) (R. 410-413), and this defense as set forth in case number 3202 (the fur case) had as its basis a claim that a joint business venture existed between the owners of the furs and Julius Petty, the deceased driver of the automobile, so as to impute Petty's negligence to them (R. 445-446, 455-456). At no time was it claimed that the owners of the furs themselves were contributorily negligent. Thus, at the pleading stage of the proceedings, both counsel for the petitioner and the respondents treated the contributory negligence phase of the case as governed by federal law, that defense being a matter of affirmative defense under Rule 8 c, Federal Rules of Civil Procedure. Without particular reference to the ultimate burden of proof at the trial, it was taken to be the duty of the petitioner to plead the defense in such cases as it deemed it applicable. This was clearly the manner in which the situation was presented to the trial court (R. 330). Such a construction of the law was squarely in keeping with the pronouncement of *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943), indicating, "Rule 8 c covers only the matter of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases * * * must apply." Indeed this procedure followed below seems the solution suggested by the United States Court of Appeals for the Eighth Circuit in *Fort Dodge Hotel Co.* v. *Bartelt*, 119 F.2d 253 (8th Cir., 1941), a case arising in Iowa. This moreover, is in complete accord with the rule adopted in the Iowa state courts, which logically places emphasis on the burden of proof of the absence of contributory negligence as opposed to the pleading of such fact, it being permissible to offer proof in the absence of the pleading where

no objection is made. *Wilson* v. *Corbin*, 214 Iowa 593, 41 N.W.2d 702 (1950); compare Rule 15 b, Federal Rules of Civil Procedure.

At the trial no disagreement among the parties was reflected concerning this issue and it was agreed by the respondents that the burden was on the administratrix of Julius Petty to prove Petty's freedom from contributory negligence in case number 3200, and the jury was specifically so instructed (*e. g.*, R. 382).

No suggestion was ever made by petitioner that the contributory negligence issue had any place in the case of Joe Forrest Petty; nor was such issue raised in the fur case other than the imputation of negligence feature of the joint venture defense. No evidence was offered to sustain this defense, and indeed petitioner's counsel candidly admitted to the court that he had no Iowa decisional law to cite in support of the defense (R. 357, 359). No other instructions were offered or requested by petitioner and the only objection to the instructions is irrelevant to any issue now argued (R. 399).

Indeed when one instruction was presented by the petitioner's trial attorney, it developed that it was incorrect in that it implied that the contributory negligence issue existed in other than case number 3200. The trial judge stated that he would modify the instruction and counsel for the petitioner agreed with the correctness of this action. The matter thusly appears in the record (R. 373):

> "The Court: Number 3 is going to be modified so as to eliminate these plaintiffs to whom contributory negligence is not applicable.
>
> "Mr. Kinney: That's right."

No mention was made of the issue in the motions for directed verdict save in the Julius Petty case (R. 251, 325).

Even more compelling is the fact that in its brief filed in the United States Court of Appeals, petitioner admitted that contributory negligence had a place only in the Julius Petty case. The following language appears in its brief at pages 10 and 11:

> "Defendant's motions to dismiss raised the further point that recovery was barred because contributory negligence of Mr. Petty was established as a matter of law. Defendant now concedes that this point should be limited to case No. 3200, the wrongful death action brought by Mr. Petty's administratrix."

The specifications of error by petitioner in the Court of Appeals as copied verbatim in its opinion show that the claim with reference to contributory negligence was confined to case number 3200 (App. A 4) and the summation in point II of the brief supporting the petition for rehearing in that Court further reveals that this was the case (App. A 19).

In the light of the foregoing procedural history of the contributory negligence issue in the trial and appellate courts, the claims now made may be clearly refuted. Initially, it is intimated on page three of the petition that the trial court's instruction that the negligence of the driver could not be imputed to the passenger or the fur owners was erroneous under Iowa law. This intimation is incorrect. Iowa decisional law as cited in the petition itself (page 13) clearly demonstrates that the negligence of the driver cannot be imputed to the passenger. *Paulson* v. *Haker*, Iowa , 95 N.W.2d 47 (1959). The only basis for imputing the negligence of the driver to the owner of the furs would lie in a joint venture situation. As mentioned, no evidence was offered below to support this claim and no objection was lodged to the trial court's exclusion of this issue from the case (R. 360).

Moreover, this joint venture claim was not raised in the United States Court of Appeals, nor is it mentioned in the petition in this Court.

In so far as petitioner affirmatively contended in the fur case and the minor's case that the collision was in fact a result of the negligence of Julius Petty, the burden under Iowa law was on it to establish this, *Frideres* v. *Lowden*, 235 Iowa 640, 17 N.W.2d 396 (1945). It is therefore patent that imputation of negligence could be no issue and that petitioner's chief complaint lies in the claim that the personal representative of the deceased thirteen year old and the owners of the furs had a burden under Iowa law to prove that such parties were not guilty of contributory negligence in connection with the automobile accident.

Apart from the fact that under Iowa law the primary duty to keep a lookout is that of the driver, *Scott* v. *Chicago, R. I. & P. R. Co.*, 197 F.2d 259 (8th Cir.; 1952), and the obvious factual consideration that the thirteen year old passenger would have been completely unable to take any action to avoid the accident in addition to the instantaneous reaction of his father, petitioner has overlooked the point that under Iowa law a minor below the age of fourteen is presumed to be incapable of contributory negligence and that the presumption must be overcome with positive proof. *Twohey* v. *Brown*, 246 Iowa 114, 66 N.W.2d 870 (1954); *Lenth* v. *Schug*, 226 Iowa 1, 281 N.W. 510 (1938), aff'd on reh. grntd., 226 Iowa 1, 287 N.W. 596 (1939). No such proof was offered by petitioner.

In so far as the fur owners are concerned, it is difficult factually to conceive how they, 375 miles from the scene of the accident (R. 180), having entrusted the furs to Julius Petty, a man of substance in the community, of good habits (R. 235-237), and of physical prowess, being

a world's champion trapshooter (R. 206), could have been guilty of contributory negligence. It is perhaps forgivably facetious to belabor the obvious point that the inanimate furs themselves could have taken no action with reference to the collision. Moreover, petitioner cites no case in which the owners of destroyed or damaged property in an analagous case were charged with the duty of proving their freedom from contributory negligence under Iowa law.

In view of all these considerations, we suggest to the Court that petitioner's counsel in the trial court and the Court of Appeals knew that there was no basis, either factually or as a matter of Iowa law, for raising the issue of contributory negligence in cases numbers 3201 and 3202, and therefore designedly and advisedly acquiesced in the trial court's rulings to that effect.

The only remaining facet of this issue is whether or not respondents in case number 3200 (the Julius Petty case) in fact submitted sufficient proof on the issue of contributory negligence to justify the submission of the cause to a jury. It is seemingly claimed by the petitioner that Julius Petty was guilty of contributory negligence as a matter of law. Quite to the contrary, in Iowa a jury issue is almost invariably presented on this issue, *e. g.*, *Aitchison* v. *Reter*, 245 Iowa 1005, 64 N.W.2d 923 (1954), and if *any* evidence tends to establish a plaintiff's freedom from contributory negligence, a jury question is presented, *Smith* v. *Darling & Co.*, 244 Iowa 133, 56 N.W.2d 47 (1952). Petitioner claims that because Julius Petty's car ultimately collided on its left side of the road rather than careening off an embankment or driving head-on into the truck of the petitioner, he is guilty of contributory negligence as a matter of law. While he did veer at the last instant onto the left side of the highway, under Iowa law a competent legal excuse was presented in the light of the Iowa sudden

emergency doctrine, *Babendure* v. *Baker*, 218 Iowa 31, 253 N.W. 834 (1934). Petty violated no speed statute and reacted instantly although unsuccessfully to the peril thrust upon him by petitioner's driver. The factual situation here presented was for the jury under Iowa law and we conceive that substantial error would have been committed, both under Iowa law and under the rights guaranteed a litigant in a federal court under the Seventh Amendment, if the cause had been taken from the jury on the issue of contributory negligence, or indeed on any other issue.

Summary.

In summary, the treatment of the pleading requirements of federal law and the burden of proof imposed by Iowa law was correct. The burden of proof on the contributory negligence issue was properly imposed on Julius Petty's personal representative, but no basis existed factually or under Iowa law to impose this burden in the remaining cases. Petitioner not only failed to make seasonable objection in connection with these matters, but positively agreed with our position in several instances, in both the District Court and the Court of Appeals. Review of questions not raised below has been consistently denied by this Court, *e. g.*, *Lawn* v. *United States*, 355 U.S. 339 (1958), and should be denied here. No reason exists to depart from that rule in this instance. Indeed the results below should have been the same even if petitioner had raised such questions below. Finally, it is clear that a jury issue was created under Iowa law in the one cause in which respondents had the burden of proof on the contributory negligence case, and a jury issue was created on the issue of proximate causation in all cases.

No Important Question of Federal Law Is Presented.

No important question of federal law is presented in this case, and no such claim is made. The question posed but not decided in *Dick* v. *New York Life Insurance Company*, 359 U.S. 437 (1959), is not presented because the United States Court of Appeals held that a jury question was presented, whether measured by Iowa law, Florida law, or by the federal rule; cf. *Tradewind Transportation Company* v. *Taylor*, 267 F.2d 180 (9th Cir., 1959), cert. den. U.S. , 28 Law Week 3104 (1959).

There Is No Conflict of Decisions.

No claim is made that the instant decision conflicts with any opinion of this Court. While there is some allusion in the petition to a conflict between this decision and prior rulings of the Court of Appeals for the Eighth Circuit, no specific case involving a similar factual situation or the statutes here involved is suggested as presenting a conflict. Actually, many of the cases cited in the petition, *e. g.*, *Scott* v. *Chicago, R. I. & P. R. Co.*, 197 F.2d 259 (8th Cir., 1952), are railroad crossing cases with substantially different principles of law involved. No more can be said for the "conflict" argument than that the same principles of Iowa law were correctly applied in the various cases cited and in this case to substantially different factual situations. The fact that other Iowa cases exist in which plaintiffs did not prevail, or in which defendants did not have substantial judgments rendered against them does not display a conflict.

CONCLUSION.

The dispute below was factual and it scarcely represents a cause commending itself to the discretionary review of this Court. This case is of little value as precedent absent the remarkable coincidence of a substantially similar automobile accident in Iowa. All matters involving Iowa law were correctly treated below. Many of the arguments here advanced are contrary to positions adopted below and are only initially advanced here. No conflict of decisions exists and no substantial question of federal law is raised. The petitioner has had its rightful day in the trial court, and the one appeal provided by statute. It is entitled to no more. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do certify that copies of this brief have this day of November, 1959, been delivered by hand to Michael L. Kinney and Morris E. White, Citizens Building, Tampa, Florida, of counsel for petitioner, and have been transmitted by mail to Robert H. Walker, 609 Blondeau Street, Keokuk, Iowa, attorney for petitioner.

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